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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-81

UNITED STATES OF AMERICA, PETITIONER

v.

LOARN ANTHONY BISWELL, RESPONDENT

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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regular course of business he makes loans on guns owned by individuals. (Record, Vol. III, pp. 85, 87, 88, 167) From two different individuals he made loans on two single shot twenty-two caliber rifles which were shortened so as to fall within the definition of "firearms" under the Federal Gun Control Act. (Record, Vol. III, pp. 67, 77, 88, 89, 90, 91)

The individuals pawning the two short guns with respondent had not registered them nor applied for a transfer to respondent as required by the Federal Gun Control Act. Furthermore, the two short guns were not identified by a serial number as required by the Federal Gun Control Act. Neither the owners of the guns nor respondent applied for such serial numbers. There was no discussion between the owners of the guns and respondent as to the registration and need for identification numbers. (Record, Vol. III, pp. 82, 95, 96, 112, 182)

The respondent openly made the loans on the two guns in the public part of his business with other customers present. He then had the guns placed in the open in a storeroom with other pawned guns where police officers frequented before. (Record, Vol. III, pp. 69, 72, 73, 78, 79, 80, 82, 87, 88, 90, 103, 104; Vol. IV, pp. 150, 151) These were the two guns seized by Hupp.

REPLY TO REASON 1.

In reply to petitioner's contention that the inspection provision does not "...dilute the reasonableness standard of the Fourth Amendment" respondent first objects to petitioner's insertion

of alleged facts not of record in the Court below. None of the facts stated in Reason 1, with the exception of the location of the magistrate in Carlsbad is of record.

The petitioner obviously is attempting to buttress his burden below of establishing that the search was or any search under the act without a warrant is reasonable when he attempts here to make use of facts not of record. This court has held that:

> "Searches conducted outside the judicial process without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject only to a few specifically established and well-delineated exceptions..." Katz v. United States, 389 U.S. 347, 357 (1967)

> "[T]he burden is on those seeking the exemption to show the need for it." United States v. Jeffers, 342 U.S. 48, 51 (1951)

It is respondent's position that in the case below the prosecution did not meet this burden. The exceptions to the need for a search warrant are where the search is incident to a valid arrest or in "exceptional circumstances" such as where violence, a moving vehicle, "...or imminent destruction, removal or concealment of the property intended to be seized..." is involved. United States v. Jeffers, Supra at 52; See Johnson v. United States, 333 U.S. 10 (1948)

In the case at bar no arrest was being made at the time of the search nor were there any facts bringing the search without a warrant within the other exceptions. There was no emergency and as in United States v. Jeffers, Supra the officers "could have easily prevented any... destruction or removal [of illegal guns] by merely guarding the door." This is equally true of any search under the act where none of the exceptions are present.

As in Johnson v. United States, Supra the only reasons offered for not obtaining a search warrant is inconvenience to the officers and implementation of the program in the act. In reference to inconvenience this court in the Johnson case stated that:

> "These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement."

As for implementing the program under the act of controlling misuse of firearms, the same sort of argument in Colonnade was turned down by this court.

Petitioner in Reason 1 also attempts to justify warrantless inspections under the Federal Gun Control Act as not diluting the reasonableness standard of the Fourth Amendment because it only authorizes "...inspections...of particularized items on the dealer's premises during business hours." In its argument petitioner overlooks the "Plain View Doctrine," that is, although the officer's original entry is limited to inspection of guns, once he is on the premises

and sights evidence of a crime that is in plain view such evidence is admissible in a prosecution for another crime. Harris v. United States, 390 U.S. 234 (1968) The protection of the Fourth Amendment that calls for search warrants to specify what items can be seized is thereby circumvented. Stanford v. Texas, 379 U.S. 476 (1965)

Furthermore, the ordinances and statutes involved in Colonnade Catering Corp. v. United States, 397 U.S. 72 (1970), See v. Seattle, 387 U.S. 541 (1967) and Camara v. Municipal Court, 387 U.S. 523 (1967) which petitioner attempts to distinguish also limit inspections to the subject matter of the enactments. This was not held by this court to be a safeguard of the reasonableness standard of the Fourth Amendment.

In conclusion to respondent's reply to Reason 1 it is his position that the inspection provision of the act should not be upheld because it would constitute an errosion of the protection of the Fourth Amendment and set a dangerous precedent enabling enactment of other ordinances and statutes with inspection provisions that would do away with the need of a search warrant in all walks of life. See Smith v. Allwright, 321 U.S. 649 (1944)

REPLY TO REASON 2.

In Reason 2 petitioner attempts to narrow this court's holding in Colonnade Catering Corp. v. United States, Supra to that of an unreasonable search and seizure because Congress "...had not

authorized forcible entries without a warrant..." Actually this court's broad holding was that:

> "Where Congress has authorized inspection but made no rules governing the procedure that inspectors must follow, the Fourth Amendment and its various restrictive rules apply. At 77."

As in Colonnade, Congress in the Federal Gun Control Act has "...made no rules governing the procedure that inspectors must follow." Lacking them, the inspectors must obtain a search warrant unless the gun dealer voluntarily consents to the inspection. Even if the holding in Colonnade was restricted narrowly as petitioner argues, it would be applicable in the case at bar. As in Colonnade, Congress in the Federal Gun Control Act did not authorize forcible, warrantless entries. A coerced entry is not any more legal than a forced entry. Bumper v. North Carolina, 391 U.S. 543 (1968)

In conclusion to respondent's reply to Reason 2, it is his position that Colonnade is not distinguishable and should apply in this case. Colonnade stood for the proposition that there must be reasonable provisions within the act authorizing inspections to safeguard the constitutional right of a proprietor from unreasonable search and seizure. That neither in Colonnade nor in the case at bar are there reasonable safeguards. Lacking them, the only remedy stated in Colonnade would be a search warrant.

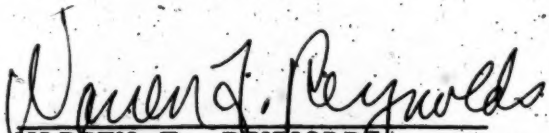
REPLY TO REASON 3.

Petitioner's argument in Reason 3 necessarily depends upon whether or not the inspection provision in the Federal Gun Control Act did away with the need for a search warrant. Petitioner assumes that it did, therefore eliminating the element of coercion by use of an unconstitutional statute. To the contrary if the appellate court below is correct in holding "...that the statute insofar as it authorized entry by the secretary or his delegate without warrant and without the owner's permission is unconstitutional..." then the use thereof by Hupp to obtain consent to the search (Record, Vol. III) "...is instinct with coercion--albeit allowably lawful coercion. Where there is coercion there cannot be consent." Bumper v. North Carolina, Supra at 548-550.

CONCLUSION

In view of the aforesaid, it is respectfully submitted that the writ of certiorari should not be granted, and the judgment of the Court of Appeals should be confirmed.

Respectfully submitted,



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